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'ARREST' IN INDIA: 360° ANALYSIS

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I. ABSTRACT

India witnesses staggering number of arrests, prompting public and legal dialogues. These encompass the arrests of over 2,000 persons for child marriages in Assam, a Union Minister for his remark against a Chief Minister, a businessman for his involvement in a pornographic racket, a Sikh separatist for his campaign for Khalistan, and a former CEO of a private bank for her role in a loan fraud case. These arrests have engendered various issues pertaining to the grounds, procedure, rights and accountability of the arrested persons and the arresting authorities, as well as the social and ethical ramifications of their actions.

The article contemplates the power to arrest an individual under the Code of Criminal Procedure, 1973 (hereinafter referred as 'the CrPC, 1973'). The Rule of Necessity is the basis for arrest, which aims to strike a balance between the societal interest of having a justiciable order in the nation and the individual interest of Right to Life and Personal Liberty. The article also delves into the Constitutionality of Arrest under the Constitution of India, 1950 (for brevity, the Constitution) vis-à-vis the Right to Freedom under Article 19 and the Right to Life and Personal Liberty under Article 21.

The article also elucidates upon the grounds and circumstances for arrest as per the CrPC, 1973 vary depending on whether the case is cognisable or non-cognisable, and whether the arrest is made by the police, a private person or a Magistrate. The article also emphasizes that regardless of the method of detention, the essential entitlements of the arrestee, such as the Right to Life and the equitable adherence to post-arrest procedure including Medical Examination, must be honoured and preserved by the authorities in conformity with the instructions established by the Hon'ble Supreme Court.

II. KEYWORDS

Arrest, Police Officer, Procedure, Constitution, IPC, CrPC.

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III. INTRODUCTION

Recently, Punjab police arrested pro-Khalistan preacher Amritpal Singh in April 2023 after a month-long manhunt. He faced charges of violence, sedition and vandalism. He was jailed in Assam.[3]

In Assam, a staggering number of 4,074 First Information Reports (FIRs) were lodged against 8,000 individuals as accused of child marriages, which are illegal under the Prohibition of Child Marriage Act 2006(hereinafter referred as the 'PCMA, 2006) and the Protection of Children Against Sexual Offences Act, 2012 (for brevity, 'POCSO Act'). The police arrested more than 2,000 people, including grooms, parents, priests and qazis. The chief minister, Himanta Biswa Sarma, said the drive would continue and sought public support.[4]

Similarly, 207 people were arrested in Gurugram on 6 February 2023 under Operation Akraman, a state-wide crackdown on illegal activities by Haryana government.[5]

Analogously, in October 2021, Ashish Mishra, son of Union minister Ajay Mishra, was arrested by SIT for Lakhimpur Kheri violence that killed eight people[6]. In July 2021, businessman Raj Kundra was arrested for his alleged role in a pornographic racket[7]. In March 2020, former Yes Bank CEO Rana Kapoor was arrested for his role in a loan fraud case involving DHFL.[8]

The National Crime Records Bureau (NCRB) provides data on persons arrested and their disposal under major heads of Indian Penal Code (IPC) and Special & Local Laws (SLL)

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[3] Al Jazeera, *Amritpal Singh: Who is he and why was he arrested?,* Al Jazeera (Apr. 23, 2023), https://www.aljazeera.com/news/2023/4/23/amritpal-singh-who-is-he-and-why-was-he-arrested (last visited July 08, 2023).

[4] Indian Express News Service, *Assam: 13 arrested for child marriages in state*, The Indian Express (June 9, 2021), https://indianexpress.com/article/political-pulse/assam-child-marriages-arrested-state-8423179/ (last visited July 08, 2023).

[5] National Crime Records Bureau, Crime in India 2021, https://ncrb.gov.in/en/crime-india (last visited July 08, 2023).

[6] Firstpost News Desk, *Lakhimpur Kheri violence: Union minister Ajay Mishra's son arrested by SIT after 11 hours of questioning*, Firstpost, 8 October 2021, https://www.firstpost.com/india/lakhimpur-kheri-violence-union-minister-ajay-mishras-son-arrested-by-sit-after-11-hours-of-questioning-10041521.html (last visited July 08, 2023).

[7] Hannah Ellis-Petersen and Amrit Dhillon, *Bollywood star Shilpa Shetty's husband arrested for making porn*, The Guardian (July 20, 2021), https://www.theguardian.com/world/2021/jul/20/raj-kundra-bollywood-star-shilpa-shettys-husband-arrested-for-making-porn (last visited July 08, 2023).

[8] PTI, *Ex-ICICI bank CEO Chanda Kochhar's arrest a wake-up call for private banks: Experts*, The Economic Times (Jan. 31, 2019), https://economictimes.indiatimes.com/industry/banking/finance/banking/ex-icici-bank-ceo-chanda-kochhars-arrest-a-wake-up-call-for-private-banks-experts/articleshow/67763877.cms (last visited July 08, 2023).

crimes[9]. According to the latest report, a total of **54,47,282** persons were arrested under IPC crimes and **35,86,456** persons were arrested under SLL crimes in 2020.[10]

On the commencement of any investigation the first and foremost deterrent effect that the accused person has to face is the Thus, arrest of people, In this article, the authors contemplate to give an idea on the topic of 'Arrest' comprehensively. In the first place, we need to understand that 'why' is it interesting and important for us to know about the procedure and entitlements of arrest. Whenever any proceedings take place, the first and the foremost thing that jeopardises the accused is punishment. And the key element that leads to finalising of punishment or acquittal is 'arrest'. But, how does 'arrest' takes place? This will be answered vividly in the article.

IV. CONSTITUTIONAL ESSENCE OF 'ARREST'

To begin with 'Arrest' basically means 'taking or keeping of a person in custody by legal authority' as per Black Law dictionary[11]. That is, to detain a person legally. Here, the phrase 'by legal authority' is of paramount importance as a person can be detained only lawfully and constitutionally. Article 21 of the Constitution vividly provides for the Right to Life and Personal Liberty. However, with the due process of law and by following the test of reasonability arrest can validly take place as an exception to Article 21. Furthermore, as per ***Roshan Beevi v Joint Sec. Tamil Nadu***[12], the Madras HC gave a three-point test to identify if the arrest is validly done or not-

1. to check the authority,
2. to check the intention, &
3. to check the legality of such act.

V. ARREST UNDER THE CrPC, 1973

Arrest can be made with warrant (as under Chapter 5 & 6 of the CrPC, 1973) or without warrant (as per Chapter 5 of the CrPC, 1973). As a general rule, arrest has to be made with warrant for

[9] National Crime Records Bureau, Crime in India 2021, https://ncrb.gov.in/en/crime-india (last visited July 08, 2023).
[10] National Crime Records Bureau, Crime in India 2020: Snapshots of States and UTs, https://ncrb.gov.in/sites/default/files/CII%202020%20SNAPSHOTS%20STATES.pdf (last visited July 08, 2023).
[11] Henry Campbell Black, 'Black's Law Dictionary Definitions of The Terms and Phrases of American And English Jurisprudence, Ancient and Modern' Revised Fourth Edition by The Publisher's Editorial Staff St. Paul, Minn. West Publishing Co. (1968).
[12] 1983 SCC OnLine Mad 163.

a cognisable offence and without warrant for a non-cognisable offence as per Sec 2(c) and Sec 2(l) respectively of the CrPC, 1973 (hereinafter referred as the Act).

To categorise such offences, legislation took innumerable factors into consideration apart from punishment of the offence with reference to Sec 4(1) of the Act. For instance, the gravity of the offence, social impact, offence against private persons or public at large, etc.

However, if the criterion has to be seen for offences outside the scope of the Indian Penal Code, 1860 (hereinafter referred as the IPC), then, the test is in regards to punishment. That is, if the punishment for an offence is of or more than three years, then it is considered to be a cognisable offence and if the punishment is of less than three years, then it amounts to a non-cognisable offence, with reference to Sec 4(2) and Table 2 of the Schedule 1 of the CrPC, 1973.

VI. WHO CAN ARREST?

A 'police officer' or a 'private person' or a 'magistrate' in certain circumstances can arrest a person.

Firstly, who is a police officer? A police officer is the one who is enrolled under the Indian Police Act, 1861. It is pertinent to note that under Section 41 of the Act, the term 'may' have been used, while giving the power to a police officer to arrest without warrant. As it serves the twin purpose, as was held in ***Joginder Singh v State***[13] -

1. giving discretionary power to the police officer and not any mechanical power,
2. It saves the aspect of constitutionality, w.r.t. Article 21.

Secondly, in case of a serious offence where there is no Police Officer nearby, a private person can also arrest as per Sec 43 of the Act. Here, a private person includes-

1. citizen of India
2. Magistrate/ Judges (if not entitled under Sec 44)
3. Armed forces (which are not covered under the IPC)
4. Police Officer, who is not on duty or is not covered under Sec 41.

Furthermore, a private person can arrest without warrant only in two cases-

1. if the accused is a Proclaimed Offender (under Sec 82(4), CrPC)

[13] (1985) 1 SCC 231.

2. If the accused commits a cognisable and a non-bailable offence

Moreover, as per ***Abdul Habib v State***[14], the word 'presence' of the private person at the time of commission of the offence must be construed strictly.

Thirdly, a Magistrate can arrest under Section 44 of the Act, including Judicial & Executive Magistrates, if-

1. Any offence is committed in his presence in his local limits, or,
2. If the Magistrate is competent to issue a warrant for arrest of any person present before him, in case the offence does not takes place in his presence.

VII. GROUNDS OF ARREST

The police officer has the power to arrest without warrant on various grounds. To put it simply, let us categorise into two parts-

1) He can arrest without warrant for offences committed in the presence of the Police Officer under Section 41(1)(a) of the Act.
2) If the offence has not been committed in the presence of the police officer, then check, if-
   - That he has received the information from a credible source, or is a reasonable complaint, or he has reasonable suspicion, &
   - That the offence so complained of is punishable with imprisonment of or less than 7 years, &
   - That the police officer has a reason to believe & it is necessary to arrest that person so that he doesn't do further offence, or, doesn't tamper with the evidence, or, creates hindrance in the proper investigation, or, causes inducement or threat to the witnesses, or, it is crucial to secure his presence, under Section 41(1)(b) of the Act.
3) If the offence has not been committed in the presence of the police officer and-
   - That the police officer has received the information from a credible source, &
   - That the alleged offence is punishable with imprisonment of more than 7 years or with death sentence, &

[14] 1973, All HC.

- That the Police Officer has a reason to believe that such person has committed that offence, under Section 41(1) (ba).

4) Section 41(1)(c) of the Act postulates that if the person is a Proclaimed Offender (under Section 82 or under any other State Govt law) can be arrested.
5) Section 41(1)(d) of the Act contemplates that if the person is found -
   - In the possession of a stolen property, &
   - It is reasonably suspected that he has committed the offence in relation to it.
6) Section 41(1)(e) of the Act vividly states that if any person-
   - Obstructs the police officer, or
   - Escapes from the lawful custody, or
   - Attempts to escape from the lawful custody, then, the person can be arrested by the Police Officer.
7) Section 41(1)(f) of the Act states that if a person is deserted from the armed forces, then the police officer can arrest him without warrant.
8) Section 41(1)(g) of the Act contemplates that if the suspect has committed an offence outside India and is liable to be punished under any Indian law, can be lawfully arrested.
9) If a person was previously convicted and does breach of Section 356(5) of the Act, then the police officer can arrest him as per Section 41(1)(h) of the Act.
10) Section 41(1)(i) of the Act provides that a police officer can arrest, if the requisition is received-
   - From another police station for arresting a person, &
   - The police officer is of opinion that he is competent to arrest him on such request.
11) If the alleged accused-
   - commits a non-cognisable offence in the presence of the police officer, or receives credible information regarding it, or
   - refuses to give his name or residence, or gives false name or address, when demanded, then the police officer can arrest him.

However, on arrest, if the person conveys the required details, then he shall be immediately released on executing bond, but if doesn't do so, then shall be produced before the Magistrate within 24 hours.

VIII. GUIDELINES BY THE HON'BLE SUPREME COURT (SC)

Arunesh Kumar v State of Bihar[15] is a landmark judgement in which the Hon'ble SC laid a checklist to be followed and submitted by the Police Officers to the Magistrate for offences punishable with less than 7 years of imprisonment. If he fails to do so, then departmental enquiry and proceedings of contempt of court can be initiated against him. Furthermore, under Section 41A a notice has to be served to the accused within 2 weeks from the date of institution of the case.

In another classic case of ***Delhi Judicial Service Association v State of Gujarat***[16], the Hon'ble court laid various illustrative guidelines to be followed in regards to arrest of a Judicial Officer-

1. The District Judge or the Judge of the HC, as the case maybe, should be immediately informed about the facts for arresting the judicial officer, and he should not be taken to the police station without prior orders or directions of the respective judge, if available.
2. The judicial officer should be given immediate facilities to inform his family members, legal advisors and other officers including the district & sessions judge
3. The officer's statement should not be recorded nor any medical test should be conducted except in the presence of his legal advisors or any other judicial officer.
4. The officer should not be handcuffed by the police unless necessary due to the resistance and in such case a report shall be sent to the concerned District & Sessions judge.

IX. PROCEDURE OF ARREST

A. PRE-ARREST PROCEDURE

To understand the Pre-arrest procedure, i.e., before the arrest takes place, let us answer the following questions-

1) How is arrest done?

[15] (2014) 8 SCC 273.
[16] (1991) 4 SCC 406.

To answer this, we need to refer Section 46(1) of the Act. It provides two ways to arrest -

- By actually confining the body of a person physically
- By submission by the accused to the custody by words or by action (surrender)

In ***Jhamel Victor v State***[17], described three ways of arresting an individual-

- By actually confining him physically
- By confining him without touching, e.g., by asking him to come to the police station
- By submission by accused (surrender)

Furthermore, in ***Parvinder Kumar Rai v Union of India***[18] it was held that handcuffing should come as a last resort if all the other means fail to arrest the person.

2) How much force can be used to arrest?

Section 46(2) contemplates that if the person forcibly resists or attempts to evade arrest only then the police officer may use necessary means to arrest.

Section 46(3) read with Section 49, further postulates that the force must not be used to such an extent as to cause death in case of arrest. However, there is an exception to it, i.e., if the arrest has to be made for an offence punishable with death or imprisonment for life, then the force can extend to causing of death as well. (Encounter)

If the arrest so made is illegal, then the person can validly exercise his right of private defence under Section 96 of the IPC and the police officer can also be made liable under Section 224 of the IPC.

3) Criteria to arrest a woman

With reference to Section 46(4) of the Act, a woman cannot be arrested before sunrise and after sunset except in special circumstances by preparing a written report & by taking prior permission of a judicial magistrate of first class.

Furthermore, as was held in ***State of Maharashtra v Christian Community Welfare Council of India***[19], that while arresting a woman, all efforts should be made to keep a lady constable, but if not possible, then a male police officer can validly arrest in day or night as per the circumstances of the case.

[17] 1991 CrLJ 2416 Mad HC.
[18] 1992 CrLJ.
[19] (2003) 8 SCC 546.

4) Criteria to search a place

Section 47 postulates that while arresting a person, the police officer can break a door or window to obtain ingress.

B. POST-ARREST PROCEDURE

This part is crucial as here Section 50 to 60 will be covered comprehensively along with other provisions and the quintessential judgments of D.K. Basu, Ritesh Sinha and Selvi will be dealt with in four parts-

1. Information
2. Bodily Search
3. Medical Examination
4. Administrative Duties

1. Information

1.1 Identity of the Police Officer

The guidelines of ***DK Basu v State of West Bengal***[20]**,** were incorporated in Section 41B of the Act, which are as follows-

a. The police officer shall bear a clear, visible and accurate identification of his name.

b. After making the arrest, the police officer shall make an **arrest memo** which shall be signed and countersigned by the person so arrested, as per Section 41B(b) of the Act. Moreover, irregularity of arrest is not a ground for invalidating the arrest after the trial, as was held in ***Prabhu v Emperor***[21] and ***Mubarak Ali v State of Bombay***[22].

c. Such arrest shall be made in the presence of at least one person.

d. Such arrested person shall be informed about his entitlements to have a relative or friend named by him to be informed of his arrest, read with Section 50A of the Act.

1.2 Grounds of Arrest and Right of Bail

[20] (1997) 1 SCC 41.
[21] 1930 SCC OnLine Lah 465.
[22] 1957 AIR 857.

Whenever the arrest is made by the police officer without warrant (Section 50 of the Act) or with warrant (Section 74 of the Act), then he shall notify the person of the grounds on which he is arrested and his right to bail in case the offence is bailable.

1.3 Duty to inform about arrest to nominated person

The police officer is bound to inform the nominated person by the accused, as per Section 41B(c) of the Act, about his arrest and shall make an entry in the case diary about it, in accordance with Section 50A of the Act.

1. Bodily Search

After the arrest takes place, then the police officer can either release the person on bail, or he can be detained as per the due process of law. If he is detained, then-

a) Bodily search has to take place. In case of a woman, then search should only be made by a female officer with strict regards to decency, as per Section 51 of the Act.

b) All the articles other than the necessary wearing apparels shall be removed from his body and a list of those things shall be prepared, which is commonly termed as 'Jama Talashi'. The things should be kept in safe custody of police, i.e., 'Kotwali Malkhana'.

c) If during the search, offensive weapons are found, then that shall be kept in the safe custody of police, with reference to Section 52 of the Act.

2. Medical Examination

This aspect will be dealt in two parts as it holds prominence-

3.1 Medical examination to attain evidences

3.2 Inspection Memo

3.1 Medical examination to attain evidences

Section 53 of the Act states the underlying idea that if the police officer believes that by any sort of medical examination, evidence can be attained in relation to the offence, then he can go ahead with the same. It includes examination in relation to blood, stains, semen, DNA profiling and 'such other tests', as per the Explanation to Section 53.

A) What all is included in 'Medical Examination'?

In ***Selvi v State of Karnataka***[23]**,** the Hon'ble SC held that 'such other tests' in the Explanation includes all other tests of the like nature which are to be done only by the medical practitioner. Thus, brain-mapping, NARCO analysis, lie-detector are included in the list.

But a question arose as to the voice sample, as it is not done by the 'medical practitioner'. Therefore, the SC in ***Ritesh Sinha v State of U.P.***[24] held that voice sample can be collected under Section 53 but only by the Magistrate under Article 142 (inherent powers) of the Constitution of India, 1950 (hereinafter referred as the Constitution).

B) Constitutionality of the provisions related to medical examination

In ***Kathi Kalu v State of Bombay***[25], the SC answered the question if these tests are violative of Article 21 and laid down that-

- If there is a conflict between 'social justice' and 'personal Liberty', then the former will be taken into consideration.
- Article 21 itself states that, if there is a due process and procedure as laid by the law, then it will not amount to violation of Article 21.
- For the protection of the accused, the court laid a guideline that the police officer shall intimate the Magistrate before doing such examination.

Furthermore, in ***Selvi v State of Karnataka***[26], the court laid down a test for the constitutional validity of Section 53 & Section 54 of the Act in regards to Article 20(3) of the Constitution. The court held that-

- If the sample itself does not become evidence, but it makes other samples so collected from the crime scene as admissible, e.g., samples of blood, urine, semen, DNA, etc., then these can be taken without the consent of the accused.
- However, if a statement is taken from the accused as testimony, which can be directly used as evidence, then it can only be taken with the consent of the accused. If it is taken without his consent, then it would be violative of Article 20(3) of the Constitution.

3.2 Inspection Memo

[23] (2010) 7 SCC 263.
[24] (2013) 2 SCC 357.
[25] AIR 1961 SC 1808.
[26] (2010) 7 SCC 263.

As per Section 54 of the Act, an inspection memo has to be prepared by the police officer in which the marks of injury or violence on the body of the accused, when it was caused, etc. has to be recorded before producing the accused in front of the Magistrate. This basically deals with the general bodily examination of the accused so as to keep a check that no torture is done by the police, i.e., custodial violence, etc.

Section 54 was amended in 2009 to incorporate these provisions after the famous judgement of ***D.K. Basu v State of West Bengal***[27]**.** Not only Section 54, but also Section 41B, Section 41C and Section 41D of the Act were incorporated. Before 2009, the arrestee may request for the general examination under Section 54 to the police. However, this was questioned as, in case torture has been done on the arrestee then the police may refrain from going for such examination.

Therefore, after 2009, an amendment was brought forth to amend the section and make the examination mandatory. It shall include the type or nature of the injury and the time of such injury soon after the arrest is made and before producing him before the Magistrate.

Moreover, the copies of all documents including Memo of Arrest (under Section 41B), medical examination (under Section 54), report, case diary extracts (under Section 167(1)), if cognisable offence, then list as per Section 41(1)(b), etc. shall be sent to the Ilaka Magistrate.

4. ADMINISTRATIVE DUTIES

4.1 Police Control Room-

Section 41C as was laid after the DK Basu judgement, states that-

The State government shall establish a Police Control Room at the District and at the State level. At the district level, the control rooms shall display the names of the arrested persons and their address, and by which police officer where they arrested. At the State level, the control rooms shall make a database of the information regarding name of the person arrested for which offence.

4.2 Right to consult Advocate

Section 41D as was laid after the DK Basu judgement in tandem with Article 22(1) of the Constitution, postulates that-

[27] (1997) 1 SCC 41.

When the arrestee is under interrogation then he has a right to consult his advocate, although not during whole of the investigation.

As per the Legal Services Authority Act, 1987, free legal aid is provided for any offence at any stage, including investigation. Even before the enactment of this Act, the Hon'ble SC in ***Khatri (I) v State of Bihar***[28] had held that-

- Legal aid is a fundamental right of the accused under Article 21 of the Constitution and the Court is under constitutional duty to provide free legal aid.
- It is not restricted to offences which are triable by the Court of Sessions but to all the offences triable by any court.
- Even before the cognisance is accrued or taken by the Court, the court can provide free legal aid.

The importance of legal aid can be deduced from the judgement of ***Sukhdas v UT of Arunachal Pradesh***[29]. It was held that if the court fails to provide free legal aid and passes order of conviction or sentence, then it can be set-aside solely on this ground.

X. CONCLUSION & SUGGESTIONS

Thus, the provisions of arrest are comprehensively dealt with under the Act. The imperative role of the Hon'ble courts and the police officers in following the provisions of the Acts is commendable. But as there is always a scope for amelioration, some suggestions have been elucidated as follows:

a) The arrests should be made very cautiously as the NCRB report shows 77% of India's prisoners are undertrials, with UP, Bihar and Maharashtra having the highest numbers.[30] Thus, the principle that was laid by the Hon'ble Supreme Court in ***State of Rajasthan v. Balchand alias Baliya***[31], that 'Bail is the rule and Jail is an exception' should be adhered to. This principle is itself based on a profound principle of 'Presumption of innocence until proven guilty'.

b) The police should exercise their power of arrest with caution and discretion, and only when it is absolutely necessary to prevent further crime, tampering of evidence, or

[28] (1981) SCC 627.
[29] (1986) SCC 401.
[30] National Crime Records Bureau, Executive Summary of Crime in India-2021, https://ncrb.gov.in/sites/default/files/PSI-2021/Executive_ncrb_Summary-2021.pdf (last visited July 8, 2023).
[31] AIR 1978 SC 195.

absconding of the accused. They should not arrest a person merely on suspicion or to extract confession or bribe.

c) The police should follow the guidelines laid down by the Supreme Court in ***D.K. Basu v. State of West Bengal***[32], which include informing the arrested person of the grounds of arrest, informing the relatives or friends of the arrested person, producing the arrested person before a magistrate within 24 hours, providing medical examination and legal aid to the arrested person, and maintaining a register of arrests.

d) The magistrate should exercise his or her judicial mind while granting or denying remand to the police or judicial custody. The magistrate should not act as a rubber stamp for the police and should examine the grounds and necessity of remand. The magistrate should also ensure that the arrested person is not subjected to torture or ill-treatment in custody.

e) The arrested person should be made aware of his or her rights and remedies under the law, such as the right to bail, the right to consult a lawyer, the right to remain silent, and the right to file a complaint against any violation of his or her rights. The arrested person should also be given access to legal aid and medical care if needed.

f) The courts should expedite the trial of the arrested persons and dispose of their cases without undue delay. The courts should also grant bail to the accused unless there are reasonable grounds to believe that he or she may abscond, tamper with evidence, or commit further offences. The courts should also impose reasonable conditions for bail and not excessive or arbitrary ones.

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